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IN THE

Supreme Court of the United States

October Term, 1956

No. [redacted]142

JAY LEE GIBSON, *Petitioner*,

v.

GUY A. THOMPSON, TRUSTEE, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, *Respondent*

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

October Term, 1956

No. 1034

JAY LEE GIBSON, *Petitioner*,

v.

GUY A. THOMPSON, TRUSTEE, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, *Respondent*

PETITIONER'S REPLY BRIEF

I.

Respondent's Statement of Facts Does Not Include Those Facts Favorable to Petitioner.

Reason requires the concession that Respondent could have covered its railroad yards with gravel of such a hazardous nature that it would be negligent as a matter of law to require employees to walk on it. For example, gravel as round as marbles spread a couple of inches over a base as firm as concrete would be considered negligent as a matter of law. At the other extreme, Respondent could use gravel that gave such sure footing that, as a

matter of law, it would not be negligent to require employees to walk and work on such gravel. An example of this might be the type of gravel used to surface streets spread to the same depth as when used on streets and tamped or rolled down as are streets. Between these two extremes, there lies the province of the jury.

One of the primary controversies in the present case is and has been whether the gravel actually used by Respondent falls into the classification of a type not negligent as a matter of law, or whether the gravel was of a type and was used in such a manner that the use could not be classified as negligent or not negligent as a matter of law, and thus required jury determination of the question of negligence.

The legal significance of the gravel being the primary inquiry at this point, it becomes important to examine the testimony describing that gravel, keeping in mind the admonition of this Honorable Court in *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520, that Petitioner, having secured a jury verdict and a trial court judgment, is entitled to have the facts and inferences favorable to him, and those alone, considered.

In quoting and summarizing portions of the evidence in his brief, Respondent has failed to view the evidence most favorable to Petitioner but has quoted much that is unfavorable and contradicted.

Petitioner readily concedes that the testimony quoted by Respondent was adduced on trial, but most of that testimony is not to be considered for purposes of this appellate proceeding. The trial court and the jury heard

the testimony and observed the witnesses. Their verdict and judgment are given strong weight in a F. E. L. A. proceeding on appeal where the reviewing court will look only to the reasonableness of the inferences and conclusions drawn by the jury, ignoring contradictory evidences and inferences.

Factually, Respondent has relied on testimony that:

(1) the gravel was "just regular railroad gravel" (Respondent's Brief, pp. 7, 13);

(2) the railroad yards were built in conformity with A.R.E.A. specifications (Respondent's Brief, pp. 8, 9, 16);

(3) the "looseness" of the gravel was common to all new yards (Respondent's Brief, pp. 6, 7, 9); and,

(4) apparently, contributory negligence; a person could fall "if you are not careful" (Respondent's Brief, p. 6). Petitioner "could give his undivided attention to his walking" (Respondent's Brief, p. 14). As to this, contributory negligence is not a defense in F.E.L.A. cases, 45 U. S. Code, Sec. 53.

There is testimony, favorable to Petitioner, controverting each of these points. There was direct, unequivocal and uncontroverted testimony that A.R.E.A. specifications called for pit-run gravel that would pass through a two-inch screen (S.F. 303). Yet there was a wealth of testimony, which the jury must have believed, that much of the gravel used in Settegast Yards would not pass through a two-inch screen. The gravel was variously described as "big as hen eggs or bigger" (S.F. 96), "as big as a man's fist" (S.F. 145, 157), ranging in size from "pea gravel up to at least 4 or 5 inches in diameter" (S.F. 194).

There was ample contradiction to the testimony of Respondent's resident engineer that gravel in excess of two inches was used. In fact, even the resident engineer did not so testify. His testimony was:

> ". . . we tested samples to see if it met the specifications." (S.F. 309)

Respondent's statement that "there was no intimation of any character that gravel of a different size or character was ever used by any other railroad company in covering its yards" is simply not well taken. Respondent's own testimony was that the A.R.E.A. plans and specifications called for two-inch gravel, but there was a wealth of testimony that gravel larger than that size was used (S.F. 96, 145, 157, 194). There was also a wealth of testimony by witnesses who had experience in many, many railroad yards that this was not the situation ordinarily found. Nor was the testimony that there were a "few" pieces of gravel in a yard larger than two inches in size (S.F. 138, 151). It seems a fair inference that other yards followed A.R.E.A. specifications and used two-inch gravel, but the evidence clearly shows that this was not done in Settegast.

This disposes of the contention that A.R.E.A. specifications for two-inch gravel were followed. And if we believe that A.R.E.A. specifications were generally followed in other railroad yards, as Respondent would have us do, this alone disposes of the contention that the gravel was "just regular railroad gravel". But note also the testimony of Pat O'Connell, who had been "railroading" about forty-five years, who testified:

"Q. Is that the size gravel they use in all of the yards?
A. No, sir. I am not too familiar with all of the southern yards, but wherever you are in a coal-burning district there is gravel put down first on the dirt and it is covered with cinders, or some other material where you can navigate around it. In Settegast Yards they covered the leads with shell where the switchmen can have a place to walk and can walk in safety." (S.F. 139).

Considering Respondent's contentions that the "looseness" of the gravel at Settegast Yards was common to all new railroad yards and that it would settle in time, there was ample contrary evidence that this was not so. On cross-examination a locomotive engineer testified that in the six months since the gravel had been laid, the gravel hadn't packed any, but was about the same (S.F. 144-145). He testified also that he had been in and out of about one hundred railroad yards in his forty-five years of railroading and this condition did not exist in other yards. Settegast Yards was the worse he had ever seen (S.F. 138). If this was the normal situation and if the gravel would become less loose with time, why did Respondent surface about 7,600 feet of leads for the switchmen (S.F. 139)? Contrary to Respondent's contentions, it was possible to tamp down the gravel. Respondent's own resident engineer testified:

"Q. Was there any rolling or tamping?
A. The only tamping is immediately in the tracks. There is no tamping between the tracks. The only tamping along the tracks was by a machine." (S.F. 304)

Spread over the yards to a depth of a foot or more (S.F. 19, 303), the gravel was rolling and hard to walk

in as it would work under the employees' feet causing slipping and sliding. (S.F. 194, 309).

"A. * * * But about that loose gravel, whether you are walking or driving a car in it, *it is a pretty dangerous proposition.*

Q. Why is that?

A. Well, when you step on it gravel goes in all directions, and you fall if you're not careful." (S.F. 136-137).

"Q. Would you say the condition you have described in Settegast Yards was a condition that existed generally over all the yards?

A. No, sir, that condition out there was the worst I ever saw. (S.F. 138). The gravel wasn't even with the ties. There was quite a bit of irregu ity" (S.F. 155).

Petitioner and other employees would avoid the walk across this gravel if possible (S.F. 19-20, 51, 157).

There is some indication that Respondent recognized this dangerous situation.

At least *several* people had lost their footing in the sliding gravel and fallen down (S.F. 137, 146, 201). One who had fallen testified of several incidents (S.F. 137). This hazardous situation was corrected in one portion of the yard where Respondent covered about 7,600 feet of leads with sand so that the switchmen could have a place to walk in safety (S.F. 139). These walkways were provided by spreading cover sand (S.F. 313), which had cement in it and normal moisture would set up a crust about one and one-half inches thick (S.F. 310). But there was no pathway or any other safe means provided for engineers to cross the yard from the roundhouse to yard "C" (S.F. 21, 137), though there was nothing to

prevent Respondent from providing the same, simple, inexpensive pathways for other employees as it had provided for the switchmen by the simple expedient of spreading cover sand to form a pathway wider than the length of a box car. It is apparent that this matter was given some thought as evidenced by the testimony of C. R. Dubose, resident engineer on the construction of Settegast Yards, who, testifying for Respondent, said in reference to the engineers having to walk across this gravel: "I thought there would be provisions made for them to walk over there" (S.F. 311).

Petitioner takes exception to those portions of Respondent's Brief (pp. 17-19) to the effect that this type of gravel and the method of laying it were chosen for engineering reasons, citing drainage, vibration and inability to pack. This is pure speculation on Respondent's part. There was no evidence introduced on any of these matters. If those were factors to be considered, Respondent had the opportunity to bring them up at trial for the jury's consideration in arriving at their verdict. Respondent cannot now introduce evidence on appeal. Aside from that consideration, how can Respondent hide behind plans and specifications when the evidence affirmatively shows that he did not follow those plans and specifications.

Collected below are a number of similar cases in which a railroad was held negligent because of the condition of its yards.[1] This listing is representative and certainly not

[1] **Webb v. Illinois Central R.R. Co.**, 352 U.S. 512, 77 S. Ct. 451, 459, 1 L. Ed. 2d 503 (buried clinker); **Atlantic Coast Line Railroad Co. v. Gunter**, 5 Cir., 229 Fed. 2d 842 ("chunks of rock which, because they were uneven, insecure and loose, would shift and roll under the feet." Note that here too Defendant urged as a defense the contention that the roadbed had been built in accordance with

exhaustive. The jury, hearing the evidence with an opportunity to observe the witnesses and judge their demeanor and credibility, found Respondent guilty of negligence in requiring the Plaintiff to walk from the roundhouse across the yard to his engine under the circumstances and conditions then existing. This condition has been fully described and included the sizes of the gravel and the failure to tamp or pack it down. Respondent could have corrected this situation, if he did not wish to pack the gravel, by the simple expedient of making a pathway across the yards of a width in excess of the length of a box car or locomotive. Respondent could have used the same simple, inexpensive method he used when he made approximately 7,600 feet of paths for the switchmen. Other methods of transporting the engineers to their locomotives in safety were undoubtedly available.

This was the situation that faced Petitioner on the night of his injury. He had made arrangements for an automobile ride around close to the roundhouse earlier in the evening. While at his engine he was called upon to walk back across this gravel to confer with the train dispatcher by telephone about a missing brakeman (S.F. 24).

These facts were presented to the jury and the trial judge.

Petitioner does not contend that these facts state a case of negligence as a matter of law, but he does contend vig-

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good engineering practice); **Wantland v. Illinois Central Railroad Co.**, 7 Cir., 237 Fed. 2d 921 (soft and loose cinders); **McCracken v. Richmond, Fredericksburg & Potomac R. Co.**, 4 Cir., 240 Fed. 2d 484 (general condition of the ground); **Widder v. N. Y., Chicago and St. Louis Railroad Co.**, 142 Fed. Sup. 830 (W.D. Pa.) (insecure footing); **Marcades v. New Orleans Terminal Co.**, 111 Fed. Sup. 650 (E.D. La.) (four or five inch clinker in ground); and **Wiser v. Missouri-Pacific Railroad Co.**, 301 S.W. 2d 37 (clinker), and numerous authorities cited therein.

orously that they do not state a case of no negligence as a matter of law. Rather, the facts fall between these two extremes—in the province of the jury—where Petitioner has always contended this case belongs.

II.

The State Court Did Not Follow Controlling Federal Decisions.

Petitioner has never contended, either in his briefs or in his oral arguments before the Supreme Court of Texas, that negligence is not a necessary element of recovery in F. E. L. A. cases. His contention, vigorously asserted, is and has been that the decisions of the Federal Courts govern in actions brought under the Federal Employers' Liability Act and that "the *kind* or amount of evidence required to establish it (negligence) is not subject to the control of the several states". *Jesionowski v. Boston & M. R.R.*, 329 U.S. 452, 457, 67 S. Ct. 401, 91 L. Ed. 416, 169 A.L.R. 947 (emphasis added). The rights asserted by Petitioner in this case are federal rights given him by federal statute, enforced by federal rather than by local rules of law.

The Supreme Court of Texas in plain contravention of the federal decisions stated at one point:

> "We disagree with Respondent's contention that this question (what constitutes a reasonably safe place to work) is to be determined by federal decisions alone."

And again,

> "We adhere to the rule that this court in determining the question of no evidence reserves the right to ap-

praise the evidence in accordance with the concept of negligence as announced by this court in prior cases.'"

Congress did not intend that varying conceptions of negligence would give a cause of action to an employee in one state and deny that same cause of action in another state. Rather, Congress intended a uniform system to be applied in all jurisdictions. If each state reserved to itself the right to appraise the evidence in F. E. L. A. cases according to that state's decisional law, there would result 48 different shadings and colorings of negligence even though each state reasoned from the same general concept.

The concept of negligence grows and shifts constantly as courts apply the basic "reasonable man" rule to a vast variety of fact situations. Jurisdictions differ widely as they attempt to balance the law as a guide for conduct with ever changing ideas in morals and the responsibility of man to his neighbor. Even the most cursory glance at a student's negligence hornbook reveals sharply contrasting solutions to similar problems. The uniformity in result sought by the enactment of the Federal Employers' Liability Act most certainly would be defeated if each jurisdiction were given free rein to appraise the facts according to that particular jurisdiction's prior cases—even though each jurisdiction started with the same broad, basic rule.

A further detriment to uniformity of decisions is the difficulty of separating the concept of negligence from the doctrines of contributory negligence assumed risk and allied theories. Even these doctrines differ from jurisdiction to jurisdiction. Their closeness with the concept of negligence could not be better illustrated than in Respondent's Brief where he says: seeking to demonstrate his lack of re-

sponsibility for the accident: ". . . he (Petitioner) could give his undivided attention to his walking". (Respondent's Brief, page 14). Not only is this a factor not to be considered on appeal, but it seems to charge contributory negligence or assumed risk, which are not a bar to Petitioner's cause of action.

For these reasons, this Honorable Court has said that the federal decisions in F. E. L. A. cases control. If each state attempts to reserve that appraisal to itself, as the Texas court has done, the very purpose of the Federal Employers' Liability Act would be defeated.

Had the Supreme Court of Texas not expressly stated that it would review the evidence in the light of prior state cases, it would still be apparent that this is their determination from an examination of the evidence developed in trial in comparison to the evidence recited in that court's opinion. The Supreme Court of Texas did not view the evidence in the light most favorable to Petitioner, ignoring contrary evidence and inferences. Petitioner respectfully calls several additional instances to the Court's attention:

(1) A stranger to the evidence in this case, reading only the opinion of the Supreme Court of Texas, would not be aware of the wealth of testimony that the gravel used in Settegast Yards did not conform to the two-inch gravel specifications contained in the A. R. E. A. plans.

(2) A stranger to proceedings other than the Supreme Court of Texas' opinion would not be aware of the testimony of the resident engineer of the construction of Settegast Yards that "I thought there would be provisions made for them (the engineers) to walk over there" (S.F. 311).

(3) A stranger to all other proceedings would believe that A. R. E. A. specifications were followed in the construction of Settegast Yards, but direct contrary evidence was adduced upon the trial.

That the Supreme Court of Texas so evaluated the evidence is clear and ample proof that they did not follow the dictates of this Honorable Court in reviewing this evidence, just as they said they would not.

Conclusion

The Honorable Tom C. Clark, Associate Justice of the Court, said in an address before the Section of Judicial Administration, American Bar Association, Dallas, Texas, August 27, 1956, "The purpose of the establishment of one Supreme National Tribunal was in the words of Chief Justice John Rutledge, 'to secure the national rights and the uniformity of judgments.' That is our mission". Petitioner respectfully submits that he has been deprived of a federal right in a manner that will prejudice not only him but other federally protected employees and he prays that this Honorable Court grant his application for Writ of Certiorari.

Respectfully submitted,

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STATE OF TEXAS :
COUNTY OF HARRIS :

BEFORE ME, the undersigned authority, on this day personally appeared Fred Parks, who after being by me duly sworn, upon his oath did depose and say:

"My name is Fred Parks. I am one of the attorneys of record for Jay Lee Gibson, Petitioner. On the 20th day of September, 1957, a copy of the foregoing Reply Brief for the Petitioner was mailed to the Respondent's attorneys as follows: Hutcheson, Taliaferro & Hutcheson, Esperson Building, Houston, Texas, and Woodul, Arterbury & Wren, Chronicle Building, Houston, Texas."

Fred Parks

FRED PARKS

Subscribed and Sworn to Before Me by the said Fred Parks, this the 20th day of September, 1957, to certify which witness my hand and seal of office.

Jane Love

Notary Public in and for Harris County, Texas